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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BAO CHIN, Plaintiff and Respondent, v. INTELLIGENT TEXT PROCESSING, INC., et al., Defendants and Appellants.	G031476 (Super. Ct. No. 01CC06185) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Steven L. Perk, Judge. Affirmed.

Buchalter Nemer, Fields & Younger and Christopher E. Deal for Defendants and Appellants.

Atkinson, Andelson, Loya, Ruud & Romo, James H. Palmer and Jeffrey M. Hall for Plaintiff and Respondent.

Bao Chin gave Starworks, Inc., $200,000 to purchase stock in Intelligent Text Processing, Inc., (ITP) doing business as InQuizit Technologies (IQT). He believed ITP was soon going to make a public offering and Starworks could purchase ITP stocks on his behalf. As it turned out, Chin purchased stock in Starworks and ITP never made a

public offering. When Chin discovered he had been defrauded, he filed a lawsuit against his two brokers, ITP, its president Kathleen Dahlgren, several principals in Starworks and Merrill Lynch, Pierce, Fenner & Smith (Merrill Lynch).

Chin obtained a $4,000,000 default judgment against the two brokers and three principals of Starworks (Richard Steele, Jr., Richard Steele, Sr., and Sandra Steele). The court entered a nonsuit in favor ITP and Dahlgren (collectively ITP). This appeal arises from the court's denial of ITP's motion for attorney fees. Finding its arguments without merit, we affirm.

I

FACTS

After writing a $200,000 check (payable to Starworks), Chin handwrote a memorandum delineating the details of the deal, i.e., he was paying $200,000 for 40,000 shares of ITP stock. One month later, Chin's brokers took him to a meeting attended by other Starworks investors and owners of Starworks. Chin was given a packet of documents to sign.

One of the documents was called "Conditional Release and Relief from Liability Agreement" (release agreement). It stated it was an agreement between ITP and "Starworks Investor." It contained a provision in which IQT agreed to "release and forever discharges and covenants not to sue Starworks Investor . . . from any and all claims, demands, damages, liabilities, obligations, costs, expenses, actions and causes of action of every nature, whether known or unknown, suspected or unsuspected, which IQT now holds or has at any time before owned or held against Starworks Investor . . . ." In another identically worded provision, the Starworks Investor agreed to "release and forever discharge and covenant not to sue IQT and IQT's Associates or Affiliates from any and all claims . . . actions and causes of action of every nature, whether known or unknown, suspected or unsuspected, which Starworks Investor now holds or has at any time before owned or held against IQT or Associates or Affiliates thereof . . . ."

The release agreement also contained the following attorney fee provision: "Attorney Fees. For the purpose of enforcing any provision of this Agreement, the prevailing party to such proceeding or arbitration shall receive as part of any award, settlement, judgment, or other resolution of such action or proceeding, whether or not reduced to a court judgment, their costs, including attorney overhead costs and reasonable attorneys fees." The agreement contained Chin's signature and no others.

After Chin presented his case at trial, the court granted ITP's motion for nonsuit. After the judgment was filed, ITP filed a motion requesting $105,027 in attorney fees. It argued ITP had prevailed in an action on a contract containing an attorney fee provision. The court denied the motion ruling, "[T]he action is not one based on contract. It is more appropriately one based on fraud and the causes of action are such."

II

DISCUSSION

GENERAL RELEASE AGREEMENT

The parties correctly acknowledge the issue of whether there is a legal basis for an attorney fee award is a question of law to be reviewed de novo. (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.) Under Code of Civil Procedure section 1021 parties may agree the prevailing party in any litigation between them, for any cause of action, will be entitled to attorney fees. The agreement may be narrowly drawn to cover specific causes of action based on that particular contract or broadly drawn to include any causes of action arising from or simply implicating that contract. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608.)

At issue in this case is the attorney fee clause contained in the release agreement. Interpretation of a release is governed by the generally applicable law of contracts. (*Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337.) "'A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the

time of contracting, so far as the same is ascertainable and lawful.' [Citation.] 'The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.'" (*Siligo v. Castellucci* (1994) 21 Cal.App.4th 873, 880-881.)

According to the plain language of the release, the contracting parties, Chin and ITP (using the fictitious business name IQT) mutually agreed not to sue each other.[1] Specifically, Chin agreed to discharge "IQT and IQT's Associates or Affiliates" from liability from "any and all claims . . . liabilities . . . actions and causes of action *of every nature*." (Italics added.) This broadly worded provision certainly encompassed both tort and contract causes of action.

The provision also contained very specific language limiting the situations in which attorney fees would be recoverable. It plainly stated fees were available only for actions undertaken for the "purpose of enforcing" the release agreement. Obviously, this would only occur if one of the contracting parties was sued by the other and decided to enforce the release provision as a dispositive affirmative defense.

Accordingly, the prevailing party in actions not involving *enforcement* of this release agreement would not be entitled to attorney fees. Such was the case here. ITP did not rely on the release as a defense. It was not pled as an affirmative defense to the action. ITP failed to mention the release in its motion for summary judgment. Instead, it presented evidence ITP had no knowledge of Chin, his dealings with Starworks or the documents Chin signed. Dehlgren declared that at no time did she or anyone from ITP "ever authorize any of the other defendants herein to have any dealings with the plaintiff or to act on behalf of IQT or Ms. Dahlgren in any capacity whatever."

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[1] The first sentence of the agreement specifies the release is between "Intelligent Text Processing, Inc., a California Corporation d.b.a. InQuizit Technologies ('IQT'), and the other signatory hereto, an owner of securities in Starworks, Inc. ('Starworks'), a California corporation ('Starworks Investor')."

We do not have a transcript of the trial or the nonsuit hearing. However, Chin's counsel summarized these events in his declaration filed in support of his opposition to the attorney fee motion. He attested, "The court's decision was based upon the fact that it found the evidence was not strong enough to submit to the jury on the issue of whether the involvement of ITP and Dahlgren would rise to the level of holding them liable in this fraudulent scheme. In fact, the evidence introduced by defendants Dahlgren and ITP was that they had no knowledge of these documents, that are the subject of the attorney fees motion, were ever given to 'new investors.' This fact was testified to specifically by Albert Lee, the attorney for Dahlgren and ITP who prepared these documents." ITP does not dispute this account of the proceedings.

To summarize, ITP prevailed by proving it had no part in the scheme to defraud Chin and consequently had no contractual relationship with Chin. ITP cannot receive the benefit of an agreement it never made nor sought to enforce. As discussed, the attorney fee provision was narrowly drawn to limit recovery to cases involving enforcement of the release. It does not provide ITP with a legal basis to recover attorney fees from Chin.

THIRD PARTY BENEFICIARY LAW

Citing Civil Code section 1559, ITP asserts it was the intended third party beneficiary of a valid and enforceable release. In other words, ITP would have us believe it is innocent of any misconduct but nevertheless entitled to receive the benefit from Starworks' fraudulently obtained documents. Nice try.

"Civil Code section 1559 provides '[a] contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.' Case law applying this statute has held '[t]he third party need not be identified by name. It is sufficient if the claimant belongs to a class of persons for whose benefit it was made. [Citation.] A third party may qualify as a contract beneficiary where the contracting parties must have intended to benefit that individual, an intent

which must appear in the terms of the agreement. [Citation.]' [Citations.]" (*Brinton v. Bankers Pension Services* (1999) 76 Cal.App.4th 550, 558 (*Brinton*.)

ITP cites to only one case to support its claim to be a third party beneficiary: In *Brinton, supra,* 76 Cal.App.4th at p. 553, the plaintiff sued Bankers after his investments in five limited partnerships proved to be unsuccessful. The court ruled the plaintiff's claim as to one of the partnerships was barred by his execution of a settlement agreement containing a release of claims clause in another lawsuit (involving a class action). (*Id.* at p. 558.) Although the partnership was not identified by name, the court determined the parties intended for the partnership to be a third party beneficiary of the release. (*Id.* at pp. 559-560.) It reasoned the "settlement agreement's language is very broad and comprehensive in scope. It covered all present and future litigation concerning [the partnership]." (*Ibid.*)

ITP asserts it was the intended third party beneficiary of the stock purchase agreement between Chin and Starworks (the defaulting defendants). It explains Starworks required Chin to execute the release and ITP was "clearly in the 'class of person for whose benefit the release was intended.'" It adds, ITP was expressly identified as a beneficiary.

True, the agreement repeatedly mentions ITP. However, unlike the partnership in *Brinton,* ITP was not merely acknowledged to be a beneficiary. To the contrary, ITP was repeatedly identified as a signator to the contract. At trial, it was revealed ITP's attorney created the standardized form agreement to shield the company from potential lawsuits. Indeed, the opening sentence of the form contract provides the release is entered into between IQT "*and the other signatory*" a "Starworks investor." (Italics added.) Under the boilerplate provisions of the contract, ITP and the investor mutually agreed not to sue each other. Starworks was not mentioned in these provisions.

Moreover, on the bottom of each page were spaces for two, not three sets of initials. And the last page contains pre-prepared signature lines for just ITP and one investor.[2]

Starworks is mentioned in the agreement, but not as a signator. Rather, the agreement contains several "factual recitals" regarding ITP's relationship with Starworks. For example, ITP makes clear Starworks owns no more than 6.19 percent of ITP's "issued and outstanding common stock." The agreement states, "IQT has requested that the Starworks Investor execute this Agreement to alleviate certain concerns regarding IQT's relationship to Starworks and the Starworks investors, and Starworks sale of securities to its investors, as expressed by candidates for key management positions within IQT and by potential investors in IQT and strategic partners for IQT." ITP notes Starworks' obligation to give investors the release arises from "a non-binding Memorandum of Understanding" Starworks entered into with IQT. It appears Starworks involvement in the agreement was limited to simply to handing it out. And we find Starworks, not ITP, was the intended third party beneficiary of the release agreement. Thus, as to ITP, Civil Code section 1559 is simply inapt.

CIVIL CODE SECTION 1717

Undaunted, ITP asserts it is entitled to attorney fees pursuant to Civil Code section 1717. ITP correctly states in its brief, "Civil Code section 1717 provides that the prevailing party in an action on a contract, whether or not that party is specified in the contract, shall be entitled to reasonable attorney fees if the contract contains an attorney fee provision. Under section 1717, any party, including a non-signatory to a contract, can be a 'prevailing party' on a contract under section 1717 if the other party could have obtained an award of attorney fees had he prevailed. [Citation.]" It argues "Chin's lawsuit was an action on a contract because he could not prevail on any claim unless he

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[2] The standardized contract contains two lines for the investor. One to be used if the investor is an individual and a different signature line to be used by a "Corporate, Partnership or LLC Signatory."

could avoid the plain language of the release and its waiver of claims. The trial court erred by focusing on the nature of the claims pled by Chin, rather than on whether Chin's claims implicated the release and the attorney[] fee provision contained therein." ITP is wrong again.

"The primary purpose of section 1717 is to ensure mutuality of remedy for attorney fee claims under contractual attorney fee provisions. [Citation.] Courts have recognized that section 1717 has this effect in at least two distinct situations. [¶] The first situation in which 1717 makes an otherwise unilateral right reciprocal, thereby ensuring mutuality of remedy, is 'when the contract provides the right to one party but not to the other.' [Citation.] In this situation, the effect of section 1717 is to allow recovery of attorney fees by whichever contracting party prevails, 'whether he or she is the party specified in the contract or not.' [Citation.] [¶] The second situation in which section 1717 makes an otherwise unilateral right reciprocal, thereby ensuring mutuality of remedy, is when a person sued on a contract containing a provision for attorney fees to the prevailing party defends the litigation 'by successfully arguing the inapplicability, invalidity, unenforceability, or nonexistence of the same contract.' [Citation.] . . . To ensure mutuality of remedy in this situation, it has been consistently held that when a party litigant prevails in an action on a contract by establishing that the contract is invalid, inapplicable, unenforceable, or nonexistent, section 1717 permits that party's recovery of attorney fees whenever the opposing parties would have been entitled to attorney fees under the contract had they prevailed. [Citations.]" (*Santisas v. Goodin, supra,* 17 Cal.4th at pp. 610-611.)

We clearly are not faced with the first situation in this case. The fee provision provides the right to recover attorney fees to any party "enforcing any provision" of the release. Thus, by its plain terms there is mutuality of remedy available to the two contracting parties (ITP and Chin).

As for the second situation, ITP argues the action is on the contract because in order to prevail Chin would have been required to litigate the validity of the release. Alternatively, ITP argues the action was on the contract because in the complaint Chin sought rescission of the stock purchase agreement and included a request for attorney fees in the final prayer for relief. We are not persuaded.

As mentioned above, the attorney fee provision limited recovery to cases involving the release agreement's enforcement. We recognize recovery would also be available in cases involving rescission of the release. (*Santisas v. Goodin, supra,* 17 Cal.4th at p. 611.) However, here neither party sought enforcement or rescission of the agreement.

Obviously, Chin had no reason to enforce the release because ITP did not sue him. And, as discussed above, the nature of ITP's defense at trial precluded it from also seeking enforcement of the release.

ITP argues the complaint shows Chin sought to revoke the release agreement. Specifically, it points to Chin's first cause of action entitled "Rescission of Contact for Purchase of Securities and for Restitution under California Corporate Securities Law of 1968" and fourth cause of action seeking to "rescind" his stock purchase based on Corporations Code sections 25110 and 25503. It adds that Chin claimed the release was obtained through fraud and it failed for lack of consideration.

After reviewing the complaint, we find that in the first and fourth causes of action Chin alleged ITP violated several provisions of the Corporations Code. Both claims are based on Chin's belief he was defrauded into buying worthless Starworks stock. He sought rescission of that stock purchase transaction not the release agreement.

ITP's assertion the release agreement was part and parcel of the stock purchase lacks evidentiary support. The two documents represent distinct transactions. As clearly stated in the first sentence of the release agreement, the intended signators were ITP and "an owner of securities in Starworks, Inc. . . . ('Starworks Investor')."

Thus, Chin first bought stock from Starworks and then, as a Starworks' investor, he executed the ITP release.

As for the fact Chin requested attorney fees in the complaint, it proves nothing. Several courts have held the mere pleading of a right to fees does not create an estoppel when the pleader would not have actually been entitled to recover fees in the event it had prevailed on the merits. (*Sessions Payroll Management, Inc. v. Noble Construction Co.* (2000) 84 Cal.App.4th 671, 682; See also *Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1113-1114 ["'To achieve its goal, [Civil Code section 1717] generally must apply in favor of the party prevailing on a contract claim whenever that party *would have been liable* under the contract for attorney fees had the other party prevailed'"], italics added; *Reynolds Metal Co. v. Alperson* (1979) 25 Cal.3d 124, 128 [Civil Code section 1717 "provides a reciprocal remedy for a nonsignatory defendant, sued on a contract as if he were a party to it, when a plaintiff would *clearly be entitled* to attorney's fees should he prevail in enforcing the contractural obligation against the defendant"], italics added.)

Similarly, the fact Chin was awarded attorney fees in the default judgment does nothing to aid ITP in its quest for fees. An appeal of that order is not before us. We will not speculate as to the legal correctness of that fee award.

Turning away from the complaint and focusing on the trial, ITP argues the record shows Chin litigated the validity of the release. It points out Chin sought to "prove the release was fraudulently obtained and that it failed for lack of consideration." Because the appellate record does not contain the trial transcript, ITP's only supporting record references are to Chin's opposition to the attorney fee motion. We find ITP has misconstrued the record.

ITP cites to the section of Chin's opposition where Chin argued he would not have been entitled to attorney fees had he prevailed. As part of that argument, Chin gave the reasons why the release and other fraudulently obtained documents were shown

at trial. He explained his "theory of the case was that these fraudulent and bogus documents given to [] Chin were given in furtherance of the fraud and that . . . ITP should be liable because their roles in producing the documents aided and abetted [the brokers and Starworks] in this fraud." According to Chin, he would have prevailed by simply showing ITP knew about the scheme. Obviously, this would not require enforcement or rescission of the release agreement. And because ITP was claiming to have played no role in the scheme or production of the release, Chin would not be asked to litigate whether it was enforceable.[3]

Finally, we find ITP's heavy reliance on *Star Pacific Investments Inc. v. Oro Hills Ranch Inc.* (1981) 121 Cal.App.3d 447, 463 (*Star*), is misplaced. In that case, the plaintiff sought to rescind his obligations under a real estate option agreement, deed of trust, and promissory note based on allegations of fraud. The deed of trust contained a provision authorizing "attorney fees in 'any action in which the beneficiary of the deed appears.'" (*Id.* at p. 463.) The court determined this unqualified attorney fee provision encompassed an agreement to pay attorney fees incurred "in an action to enforce the provisions of the contract as required by section 1717. [S]ince the language of the deed of trust did not limit the situation in which attorney fees would be recoverable to any particular form of action involving the contract, the suit resulting in a judgment invalidating the purported agreement between the parties . . . was an action 'on the contract' which permitted an award of attorney fees under section 1717. [Citation.]" (*Ibid.*)

Relying on *Star,* ITP argues Chin's allegations of fraud arising out of the contract would justify attorney fees to the party prevailing on that fraud claim. He fails

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[3] As for the defaulting defendants, we will not speculate if they would have sought to enforce the release as an affirmative defense. To obtain a default judgment, Chin was merely required to prove he was defrauded.

to appreciate the attorney fee provision in the *Star* deed of trust is much different from the one here. In *Star,* the court determined the parties' deed of trust contained an *unqualified* fee provision that would *encompass any action arising out of the contract*. ITP apparently overlooks the *Star* court's determination the parties' promissory note, also containing an attorney fee provision, would not similarly justify a fee award.

To explain the difference between the two fee provisions, the *Star* court discussed *Sciarrotta v. Teaford Custom Remodeling Inc.* (1980) 110 Cal.App.3d 444. That court "held that section 1717 limits reciprocity of attorney fees to those specific provisions of the contract in which the attorney fees are provided for. There the building contract provided for an award of attorney fees incurred to enforce payment of the contract price to the defendant building contractor. Plaintiffs, however, sued and recovered for a breach of the contractor's failure to construct the house in a workmanlike manner. In concluding that plaintiffs were not entitled to recover attorney fees, the court determined that section 1717 was meant to have a 'selective and literal application.'" (*Star, supra,* 121 Cal.App.3d at p. 462.)

As aptly summarized by the *Star* court, "The *Sciarrotta* court rested its decision upon two grounds. First, it examined the precedential authorities establishing that the parties to a contract may limit the instances in which attorney fees may be recovered in litigation touching upon the contract. Second, it weighed various policy considerations which disfavored an award of attorneys fees to a plaintiff under *any* action on a contract where the unilateral attorney's fee provision in favor of the defendant is limited to a particular kind of action on the contract. Among those policy factors were to resist invitation of frivolous litigation, to avoid the encouragement of needless litigation, and to encourage settlement." (*Star, supra,* 121 Cal.App.3d at p. 462.) The court in *Star* determined that while *Sciarrotta* would preclude an award of attorney fees under the language of the promissory note at issue, the language of the attorney fee provision

contained in the deed of trust was "sufficiently broad to serve as a basis for awarding attorney fees." (*Id.* at p. 463.)

In our case, the attorney fee provision in the release agreement was narrowly drawn, like the *Star* promissory note, to limit recovery to one particular kind of case. We are not persuaded by ITP's argument the provision should be interpreted to encompass any and all causes of actions arising out of the release agreement. Although Chin's fraud action may have to some small extent "implicated" the release, we find the prevailing party of the lawsuit was not required to seek either enforcement or invalidation of that contract. The court properly determined attorney fees were not warranted because the case was based on fraud not "on a contract" within the meaning of Civil Code section 1717.

The order is affirmed.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.